No. 85-1707

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1985

VIOLA MOODY, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. May the Farmers Home Administration nullify the Court's decision in *Block v. Neal*, 460 U.S. 289 (1983), and immunize itself from Federal Tort Claims Act liability to its borrowers for negligent home construction inspections that are authorized under the Housing Act of 1949, required by federal regulations, and relied upon by the borrowers, simply by adopting a new regulation providing that such inspections create "no duty" to borrowers?

2. Did the Court of Appeals misconceive the "discretionary function" exception to the Federal Tort Claims Act, by ruling that it automatically bars any suit in which the validity of a federal regulation is challenged, even where the challenged regulation is relied upon by the government as a *disclaimer* of liability to beneficiaries of a federal statute, and where the agency's employees negligently performed functions that they were legally obliged to perform?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The plaintiffs in the two district court cases were the appellants in the court of appeals. The named plaintiff in *Moody v. United States* was Viola Moody. The named plaintiffs in *Bawgus v. United States* were:

George Bawgus	Teresa Campbell
Patricia Bawgus	Donnie Campbell
Rosie Overbay	Kathy Hartley
Martha Briggs	Steven Hartley
Toney Clouse	Viva Clark
Whitney Clouse	Raymond Clark

The defendants in the district court were the appellees in the court of appeals. The defendants in *Moody v. United States* were the United States of America and Bill Cox and Charles E. Cox, d/b/a Alco Builders. The defendants in *Bawgus v. United States* were the United States and Sam Pate and John Kenny, d/b/a Rock Creek Builders.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS IN THE COURT BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS AND REGULATION INVOLVED	2
STATEMENT	2
1. Introduction	2
2. The FmHA Rural Housing Program	3
3. The *Moody* Suit	4
4. The *Bawgus* Suit	5
5. The Decision Below	8
REASONS FOR GRANTING THE WRIT	9
I. The Issues Are Important.	9
II. An Agency's Invalid Disclaimer Of Duty Cannot Relieve It Of Liability To Persons Injured In Relying On Required But Negligently Performed Functions.	10
A. The FmHA's Regulation Disclaiming Any Duty To Borrowers For Home Construction Inspections Violates The Housing Act.	10
B. The "Discretionary Function" Exception To FTCA Liability Does Not Give Effect To An Otherwise Invalid Disclaimer Of Liability.	13
CONCLUSION	18

TABLE OF AUTHORITIES

CASES:	PAGE
Bawgus v. United States (No. Civ. 2-83-145) (E.D. Tenn. June 5, 1984), *aff'd. sub nom. Moody v. United States*, 774 F.2d 150 (6th Cir. 1985)	1
Block v. Neal, 460 U.S. 289 (1983)	9, 17
Canipe v. Nat'l Loss Control Service Corp., 736 F.2d 1055 (5th Cir. 1984)	16
Dalehite v. United States, 346 U.S. 15 (1953)	15
Dupree v. United States, 247 F.2d 819 (3rd Cir. 1957)	14
Hatahley v. United States, 351 U.S. 173 (1956)	14
Indian Towing Co. v. United States, 350 U.S. 61 (1955)	16
Moody v. United States, 774 F.2d 150 (6th Cir. 1985)	1, 7, 8, 13, 16
Moody v. United States, 585 F. Supp. 286 (E.D. Tenn. 1984), *aff'd.*, 774 F.2d 150 (6th Cir. 1985)	1, 5
Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29 (1983)	13
Neal v. Bergland, 646 F.2d 1178 (6th Cir. 1981), *aff'd on other grounds sub nom. Block v. Neal*, 460 U.S. 289 (1983)	12
Park v. United States, 517 F. Supp. 970 (D. Or. 1981)	12
Rayonier, Inc. v. United States, 352 U.S. 315 (1957)	17
United States v. Varig Airlines, 467 U.S. ___, 81 L. Ed. 2d 660 (1984)	15

	PAGE
STATUTES:	
Administrative Procedure Act, 5 U.S.C. §706(2)(A)	12
Federal Tort Claims Act, 28 U.S.C. §§ 1346 (b),	2
1254 (1),	
2680 (a),	14
Housing Act of 1949, 42 U.S.C. §§ 1441,	2, 3, 11
1471 (a),	2, 3, 11
1471 (c),	3
1472,	2, 3
1476 (a)	2, 3, 11, 14
RULES AND REGULATIONS:	
7 C.F.R. §§ 1802.2 (1977),	12
1804 (1983),	4
1822.2 (1977),	12
1822.13 (1977),	12
1822.310 (1977),	12
1924 (1983),	4, 14
45 Fed. Reg 39,795 (June 12, 1980), *codified at* 7 C.F.R. §1924.9 (a) (1983)	2, 5, 8, 12, 15
LEGISLATIVE MATERIALS:	
Housing Act of 1949: Hearings on H.R. 4009 before the House Committee on Banking and Currency, 81st Cong., 1st Sess. 178 (1949)	11
95 Cong. Rec. 4716 (1949) (Statement of Sen. McCarthy)	11
MISCELLANEOUS:	
Hessian, CHARACTERISTICS OF OCCUPANTS AND UNITS OF MORTGAGED RURAL HOMES, (U.S. Dept. of Agriculture, Economic Development Div., Economic Research Service (1984))	10
Restatement (Second) of Torts (1965) § 286	5, 8, 16
§ 323	5, 8, 16

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PETITION FOR A WRIT OF CERTIORARI
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Petitioners Viola Moody, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in these consolidated cases on October 8, 1985.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 774 F.2d 150 (6th Cir. 1985). The opinion of the district court (App. B) in *Moody v. United States*, is reported at 585 F. Supp. 286 (E.D. Tenn. 1984). The April 9, 1984 Order of the district court in *Bawgus v. United States*, the Magistrate's report and recommendation which it adopted, and the June 5, 1984, Memorandum and Order issued by the district court on the federal defendants' motion for reconsideration are unreported and are set forth in App. C.

JURISDICTION

The court of appeals entered its judgment in these consolidated cases on October 8, 1985. Petitioners timely filed a petition for rehearing *en banc* which the court denied by an order (App. D at 35a) filed November 19, 1985. Petitioners timely applied to this Court for an extension of time for filing a petition for certiorari and on February 10, 1986, Justice O'Connor signed an order extending the time to file a petition for certiorari to and including April 18, 1986. The Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATION INVOLVED

The pertinent provisions of the Housing Act of 1949, 42 U.S.C. §§ 1441, 1471(a), 1472, and 1476(a); and the pertinent regulation implementing the Housing Act promulgated by the Secretary of Agriculture, 7 C.F.R. § 1924.9 (1983), are set forth in App. E.

STATEMENT

1. *Introduction.* Low income residents of two rural Tennessee counties brought these consolidated actions under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). They sued the government because of the alleged negligence of employees of the Farmers Home Administration (FmHA), a unit of the United States Department of Agriculture. Petitioners allege that the FmHA, which provided them with low-income rural home purchase loans pursuant to the provisions of the Housing Act of 1949, 42 U.S.C. § 1471 *et seq.*, negligently approved the site development plans for their homes and negligently conducted inspections

of their homes during construction to ensure that they complied with applicable federal and local construction and sanitation standards. Petitioners also alleged that they relied on the FmHA's approvals and inspections in taking the loans and buying the houses. As a result of the FmHA's negligence, petitioners now own, are indebted for — and in some cases are forced to reside in — substandard housing that is unfit for human habitation and of questionable market value.

2. *The FmHA Rural Housing Program.* The FmHA administers Title V of the Housing Act of 1949, as amended. The stated goal of the Act is to provide "a decent home and a suitable living environment for every American family." 42 U.S.C. § 1441. To accomplish that goal the Act authorizes the Secretary of Agriculture to extend financial and technical assistance, through the FmHA, to eligible rural residents in order to provide them with "decent, safe and sanitary living conditions." 42 U.S.C. § 1471(a). Under Section 502 of the Act, low-income rural residents may obtain loans to purchase homes. 42 U.S.C. § 1472. To qualify for a Section 502 rural housing loan, an applicant must establish that he lacks adequate housing, that he lacks the resources to obtain necessary housing on his own account, and that he is unable to obtain credit at a reasonable rate from any other source. 42 U.S.C. § 1471(c).

In implementing the statutory goal of making decent housing available to the rural poor, Section 502 also requires the Secretary to ensure that rural housing constructed with funds loaned under the Act "shall be substantially constructed" and built in accordance with federal standards. 42 U.S.C. § 1476. The implementing regulations require local FmHA officials to be intimately involved in supervising the construction of housing financed with Section 502 funds. The regulations also require that planning

and site development meet specified standards. 7 C.F.R. § 1804(1981, 1985). FmHA officials also must make at least three inspections of the dwelling at specific stages of construction. 7 C.F.R. § 1924.9(b)(1)(1985).

3. *The Moody Suit.* On May 15, 1980, Viola Moody applied for a rural housing loan from the FmHA office in Campbell County, Tennessee. Ms. Moody, who was 50 years old, had a sixth grade education. She sought to purchase a house for herself and her 84-year-old mother, who lived with her. Ms. Moody and her mother had a combined income of approximately $8,200 per year. (Vol. 2, Consolidated Appellate Joint Appendix ["JA (II)"] A-12 and A-13). The FmHA approved Ms. Moody's application and loaned her $29,400 to purchase a house in the Valley View Estates subdivision of Campbell County. In return, in July 1980 Ms. Moody executed a promissory note payable to the FmHA secured by a deed of trust on her new home. (JA (II) A-1 to A-10). The deed contained a provision stating that it was subject to "governing" FmHA regulations, but it did not set forth or cite any FmHA regulations.

During the construction of the home that Ms. Moody was to purchase, and before she executed the deed of trust, FmHA employees inspected the development and construction on three occasions: when the home was 2 percent complete; when it was 50 percent complete; and in June 1980, when it was 100 percent complete. (JA (II) A-15 to A-19, A-30 to A-31). The FmHA employees did not note any construction deficiencies on their inspection reports. (*Id.*). A permit for a septic tank on the property was issued in May 1980 and was finally inspected and approved the very next day. (JA (II), A-21 to A-22).

In October 1980, shortly after she moved into her new home, Ms. Moody found raw sewage in the yard around her house and water under the house and in the ditches around it. As she later learned, her house was located on poorly

drained soil in a floodplain that is not suitable for any residential development or for individual septic tank sewage systems. Her sewage system was unsafe and unsanitary, making her home uninhabitable and polluting the ground water and streams around her home. (JA (I) A-6 and A-7). As a result, Ms. Moody and her mother were forced to abandon their home in May 1983.

After exhausting her administrative remedies, Ms. Moody brought suit against the United States pursuant to the Federal Tort Claims Act (FTCA). In her complaint, she alleged that FmHA employees had negligently performed the duties imposed upon them under the Housing Act of 1949 in supervising and inspecting the site development and construction of her home. She alleged that she believed when she sought and obtained the FmHA loan that "the involvement of federal officials in the construction" of her home would assure that she would be purchasing a safe and decent home for herself and her aged mother, and she therefore asserted a claim for negligence in reliance on the common law "Good Samaritan" or voluntary undertaking doctrine set forth in the *Restatement (Second) of Torts* § 323 (1965) and the negligence *per se* doctrine set forth in § 286 of the *Restatement*.

The district court, however, held that the claims against the government were precluded by 7 C.F.R. § 1924.9(a) (1983), which asserts that FmHA inspections are undertaken for the benefit of the government only. *Moody v. United States*, 585 F. Supp. 286, 288-89 (E.D. Tenn. 1984) (App. B at 21a-22a). The court, therefore, dismissed Ms. Moody's claim under the Federal Tort Claims Act, as well as her pendent state contract claims against the builder of the uninhabitable home.

4. *The Bawgus Suit.* In June 1981, George and Patricia Bawgus applied for a rural housing loan from the FmHA

office for Washington County, Tennessee. The Bawguses were supporting themselves and their two children on a combined income of less than $10,000. Neither of them had completed high school.

In response to their application, the FmHA sent the Bawguses a letter informing them that they appeared eligible for a rural housing loan. The letter advised them:

> "If you plan to build instead of purchasing an existing dwelling, we will need to review the house plans, specifications, and building site.
>
> "Please do not obligate yourself to purchase or build any house with a FmHA loan until you have specifically discussed it with us, *and FmHA has approved the property.*" (JA (II) A-39) (emphasis added).

In early July 1981, the FmHA issued a conditional commitment to Rock Creek Builders for construction of the home that the Bawguses purchased with the FmHA loan. The conditional commitment stated that FmHA would be conducting inspections at three stages. The commitment also provided that:

> "construction must be completed in accordance with the MPS (Minimum Property Standards), drawings and specifications or description of materials submitted with the application. . . . The Farmers Home Administration will, if the construction is completed in accordance with the terms of the conditional commitment, *approve the house as suitable for a rural housing loan.*" (JA (II) A-40 and A-41) (emphasis added).

An FmHA representative conducted the required inspections and approved both the site and the construction. (JA (II) A-42). In November 1981, after construction was complete, the Bawguses signed a promissory note and deed of trust for $33,500. Their deed, like Ms. Moody's, contained a

provision making it subject to applicable FmHA regulations. As with Mrs. Moody's deed, however, the document did nothing to warn the borrowers what those regulations were or what their effect might be.

Shortly after they moved into their new homes, the Bawguses and other FmHA borrowers who purchased houses in the same development experienced severe water drainage problems. As the court of appeals accurately summarized:

> "After rains, water flooded the crawl spaces under their homes, would not drain off the property, and became stagnant and a breeding ground for insects. Driveways became unusable, yards became sinkholes, and earth pulled away from foundations and became unstable. Foundations cracked, house walls cracked, ceilings sagged, exterior paint peeled, sidewalks and steps separated from foundations, floor joists warped or buckled, and septic tanks failed." *Moody v. United States*, 774 F.2d at 152-53 n.2 (App. A at 5a n.2).

These problems rendered their new homes uninhabitable. The Bawguses and others then filed a complaint under the FTCA and also joined the contractors who had built their homes.[1] The theories of liability were similar to those set forth in *Moody*. Plaintiffs expressly alleged that the FmHA had never indicated that the government inspections were "solely" for FmHA's benefit and, rather, that they believed the inspections were for their benefit as well. (JA (II) A-206 to A-217). Nevertheless, as in *Moody*, the district court granted the motion to dismiss on the ground that

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[1] The other plaintiffs included six borrowers whose homes had been built pursuant to "conditional commitments" and two couples (the Hartleys and the Campbells) who had received loans from the FmHA and, with FmHA assistance, contracted for the construction of new homes.

the FmHA disclaimer regulation barred the negligence claims.[2]

5. *The decision below.* The Court of Appeals for the Sixth Circuit consolidated the cases and affirmed. *Moody v. United States*, 774 F.2d 150 (6th Cir. 1985) (App. A at 1a). The Court agreed with the plaintiffs that Tennessee courts would recognize the Good Samaritan and negligence *per se* doctrines expressed in §§ 286 and 323 of the *Restatement* and that "the United States under the FTCA is exposed to similar liability." *Id.* at 155, 157. (App. A at 10a, 15a). Nevertheless, the court held that plaintiffs' claims for relief are barred by 7 C.F.R. § 1924.9(a), which asserts that FmHA inspections neither create nor imply a duty or obligation to the particular borrower. *Id.* at 157 - 159 (App. A at 15a-16a). The court held that, as a matter of law, the FmHA regulation necessarily precludes borrowers from relying on the FmHA's inspections, and that reliance is an essential element of a Good Samaritan claim. The court rejected as irrelevant the plaintiffs' argument that the regulation on which the government relied contravenes the Housing Act of 1949 and thus is invalid to the extent that it purports to limit the FmHA's duty to borrowers by excluding them from the class of beneficiaries of FmHA inspections. According to the court, that objection runs afoul of the "discretionary function" exception to the FTCA, which "makes clear that an action for damages may not be premised on the invalidity of a regulation." *Id.* at 156 n.9, 158 n.13 (App. A at 13a n.9, 16a n.13).

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[2] The district courts in both the *Moody* and *Bawgus* cases dismissed the plaintiffs' pendent state contract claims against the contractors after dismissing the FTCA claims. Some of the *Bawgus* plaintiffs then pursued their contract claims against the contractors in state court and have entered into settlements with the contractor. However, these minimal settlements did not compensate plaintiffs for their personal injuries and did not release the government from liability. The tort claims of these plaintiffs, therefore, remain open.

REASONS FOR GRANTING THE WRIT

I. THE ISSUES ARE IMPORTANT

In *Block v. Neal*, 460 U.S. 289 (1983), this Court dealt with negligence claims against FmHA virtually identical to the ones here. The Court unanimously rejected the government's contention that Good Samaritan liability for negligently supervising and inspecting homes to be bought with FmHA loans is barred by the FTCA's exception for "misrepresentation" complaints. The Court expressly left open a determination of what the elements of Good Samaritan negligence claims are, but held that if a federal agency negligently performs inspections it has undertaken to perform, the government may not "shield itself completely from tort liability by adding misrepresentations to whatever otherwise actionable torts it commits." *Id.* at 298.

This case frames the questions left open in *Neal*. It also tests whether the government may "shield itself completely from tort liability" by the expedient device of simply adopting a regulation disclaiming liability. After the events underlying the claims presented in *Neal*, the FmHA amended its regulations governing the inspection of homes to be purchased with FmHA loans to add language providing that such inspections impose on the FmHA no responsibility to an individual borrower.[3] The court below held that this disclaimer — whether valid or not and whether known to the borrowers or not — automatically insulates the government from liability.

FmHA borrowers generally are poorly educated, lack prior home ownership experience, and have limited financial

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[3] Although the FmHA promulgated the amended regulation prior to this Court's decision in *Neal*, the regulation did not affect Neal, who had purchased her home in 1977. The Court, therefore, had no occasion to address the validity and effect of the amended regulation. 460 U.S. at 291 and n.1.

resources. More than 77 percent of them have less than a high school education, and nearly 19 percent have less than eight years of schooling. More than 30 percent of FmHA borrowers are recipients of social security or welfare assistance. *See* Hessian, CHARACTERISTICS OF OCCUPANTS AND UNITS OF MORTGAGED RURAL HOMES, 19-22 (U.S. Dept. of Agriculture, Economic Development Div., Economic Research Service, 1984). As in this case, they often rely on the FmHA to perform its duties of supervision and inspection correctly.

If the decision below were correct, it would deny relief to thousands of these poor and unsophisticated borrowers who commit themselves to major financial obligations to the government in reliance on government inspections, even if those inspections are disastrously negligent. The decision would also license other government agencies to immunize themselves from liability that Congress decided to impose, merely by publishing an obscure notice declaring that no one is entitled to rely on proper performance of the agencies' duties. But the decision below is wrong; it distorts the relationship between the government and its citizens under the FTCA and transforms the narrow "discretionary function" exception into a broad and impenetrable shield for official negligence.

II. AN AGENCY'S INVALID DISCLAIMER OF DUTY CANNOT RELIEVE IT OF LIABILITY TO PERSONS INJURED IN RELYING ON REQUIRED BUT NEGLIGENTLY PERFORMED FUNCTIONS.

A. The FMHA's Regulation Disclaiming Any Duty To Borrowers For Home Construction Inspections Violates The Housing Act.

Congress passed the Housing Act of 1949 with the stated goal of helping to provide "a decent home and a

suitable living environment for every American family." 42 U.S.C. § 1441 (App. E at 36a). Title V of the Act authorizes the Secretary of Agriculture to extend financial assistance to poor, rural residents to provide them with "decent, safe and sanitary living conditions." 42 U.S.C. § 1471(a) (App. E at 38a). To ensure that the rural home loan program would operate to further these goals, Congress imposed on the Secretary certain *duties* to ensure that the housing built with Housing Act loan funds would be of high quality:

> "In connection with financial assistance authorized in this sub-chapter, the Secretary *shall require* that all new buildings and repairs financed under this subchapter shall be substantially constructed and in accordance with such building plans and specifications as may be required by the Secretary. *Buildings and repairs constructed with funds advanced pursuant to this sub-chapter shall be supervised and inspected as required by the Secretary*." 42 U.S.C. § 1476(a) (App. E at 39a) (emphasis added).

In addition to imposing these duties, Congress authorized the Secretary to "furnish . . . [to borrowers] technical services such as building plans, specifications, *construction supervision and inspection*." *Id.* (emphasis added). The purpose of offering these technical services was to provide needed assistance to poor rural residents who lack the skills and resources to perform or obtain these services for themselves.[4] Throughout the life of the program, FmHA regulations have, therefore, required FmHA to conduct a variety

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[4] *See* 95 Cong. Rec. 4716-4717 (1949) (Statement of Sen. McCarthy); Housing Act of 1949: Hearings on H.R. 4009 before the House Comm. on Banking and Currency, 81st Cong., 1st Sess. 178 (1949) (Remarks of Rep. Jones).

of site and construction inspections. *See, e.g.*, 7 C.F.R. §§ 1822.13, 1822.310 (1977). Until 1980, the FmHA's regulations expressly reflected the statutory purpose of these regulations as designed to benefit borrowers. *See, e.g.*, 7 C.F.R. §§ 1802.2, 1822.2 (1977); *see also, Neal v. Bergland*, 646 F.2d 1178, 1184 (6th Cir. 1981), *aff'd on other grounds sub nom. Block v. Neal*, 460 U.S. 289 (1983); *Park v. United States*, 517 F. Supp. 970 (D. Or. 1981).

In 1980, however, the FmHA decided to respond to the growing number of FTCA suits by borrowers alleging injuries resulting from construction defects that allegedly had gone undetected due to negligent construction supervision and inspection of their homes by FmHA employees. Instead of improving the reliability of its inspections, the FmHA amended the regulation that requires inspections by FmHA employees and inserted a provision disclaiming any duty to borrowers under that regulation. 45 Fed. Reg. 39,795 (June 12, 1980), *codified at* 7 C.F.R. § 1924.9(a) (1985). The sole stated purpose of the amendment was to avoid "creat[ing] legal problems by not properly informing the public as to the purpose of these inspections." 45 Fed. Reg. 39,792 (June 12, 1980).[5]

The self-serving attempt at avoiding legal liability is "contrary to law" and thus invalid under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). It frustrates a clearly articulated and previously acknowledged congressional purpose of benefitting FmHA's borrowers. The FmHA failed to consider the effect of this disclaimer in transferring to poor and ill-educated rural borrowers the kind of supervision and inspection duties that Congress had found them incapable of assuming. Moreover, apart from the desire to avoid accountability for its negligence, the FmHA provided no

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[5] *See also* JA(II) at A-203 to A-205 (internal FmHA memoranda obtained pursuant to Freedom of Information Act request.)

explanation why its reversal of position would better accomplish Congress's goals. That failure to provide an adequate statement of reasons underscores the arbitrariness of the FmHA's decision to renounce its duties to the very people the agency was created to benefit. *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

B. The "Discretionary Function" Exception To FTCA Liability Does Not Give Effect To An Otherwise Invalid Disclaimer Of Liability.

The court below, however, declined to consider plaintiffs' arguments that the new disclaimer provision in the FmHA's inspection regulation is invalid and, therefore, could not bar their negligence claims. *Moody v. United States*, *supra*, 774 F.2d at 156 n.9, 158 n.13 (App. A at 13a n.9, 15a n.13). The court concluded that, even if the disclaimer is invalid, plaintiffs' suit would still be barred under the first clause of 28 U.S.C. § 2680(a), the "discretionary function" exception to the FTCA, which according to the court "makes clear that an action for damages may not be premised on the invalidity of a regulation." *Moody*, *supra*, 774 F.2d at 156 n.9 (App. A at 13a n.9).

That holding rests upon a fundamentally erroneous construction of the "discretionary function" exception. The portion of the discretionary function exception relied upon by the court below does not, as the court concluded, bar *all* damage suits involving an allegedly invalid federal statute or regulation. Rather, that clause provides that the waiver of the government's sovereign immunity from suit under the FTCA,

> "shall not apply to —
>
> "(a) Any claim based upon an act or omission of an employee of the Government, *exercising due care, in*

the execution of a statute or regulation, whether or not such statute or regulation be valid . . . " 28 U.S.C. § 2680(a) (emphasis added).

As the underscored language indicates, an essential prerequisite to invoking the exception is that the employee executing the statute or regulation whose validity is called into question must have acted with due care.[6] In this case, however, plaintiffs have alleged that FmHA employees performed the housing construction inspections authorized by the Housing Act and mandated by the FmHA regulations negligently — *i.e.*, without due care. Thus, as this Court has previously held, "[t]he first portion of section (a) cannot apply here, since the government agents were not exercising due care in their enforcement of the federal law." *Hatahley v. United States*, 351 U.S. 173, 181 (1956).

Moreover, the FmHA officials' negligent acts were not undertaken "in the execution" of the FmHA regulation that the plaintiffs are challenging as invalid. Rather, the FmHA officials were performing duties authorized under the Housing Act and required by FmHA regulations whose validity plaintiffs do not challenge. *See* 42 U.S.C. §1476(a) (App. E at 39a); 7 C.F.R. §1924.9(b) (App. E at 40a). The FmHA employees could not have been acting "in the execution" of

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[6] Indeed, this is the rule stated in *Dupree* v. *United States*, 247 F.2d 819 (3rd Cir. 1957), the sole authority cited by the court below in support of its novel characterization of the "discretionary function" exception. As the *Dupree* court put it, "[w]here government employees act pursuant to and in furtherance of regulations, the resulting harm is not compensable under the [Federal Tort Claims [A]ct . . . *except where they do not exercise due care*." *Id.* at 824 (citations omitted) (emphasis added). Applying this accepted construction of the discretionary function exception, the court in *Dupree* dismissed a FTCA suit in which plaintiff alleged that he had suffered injury due to the application of Coast Guard security clearance regulations, but in which there was "no allegation of lack of due care in the application of the regulations to [plaintiff]." *Id.* at 825. Thus, neither the language nor the holding of *Dupree* supports the result in the court below.

the disclaimer of liability contained in 7 C.F.R. §1924.9(a) — which is, if valid, inherently self-executing. Nor are plaintiffs alleging that FmHA was liable under the FTCA either for adopting the disclaimer regulation or for taking any action pursuant to it. Instead, the regulation has entered this case only because the government invoked it as a *defense* that makes irrelevant its failure to exercise due care in executing its duties.

Congress did not fashion the "discretionary function" exception in order to preclude tort claims for negligent conduct when the claimant must also challenge the validity of a regulation that purports to disclaim liability and is interposed as a defense. Congress included the "discretionary function" exception to make clear that the FTCA's waiver of sovereign immunity does not extend to actions for damages caused by agency exercises of regulatory authority. *See, United States v. Varig Airlines*, 467 U.S. ____, ____, 81 L. Ed. 2d 660, 672 (1984); *Dalehite v. United States*, 346 U.S. 15, 27-30 (1953). Congress wanted to avoid waiving the government's immunity from damage suits in situations where government employees have acted with due care, but where the claimant challenges the validity of the statute or regulation that authorizes the official action or otherwise protects the employees from liability for an intentional tort. In short, the purpose of this provision was to prevent the use of the FTCA to invalidate statutes or regulations and thereby to transform authorized governmental activity into unauthorized — and therefore tortious — activity. *See, Varig Airlines, supra*; *Dalehite, supra*, 346 U.S. at 30.

Under the theory adopted below, the "discretionary function" exception would give an executive agency unreviewable discretion to exempt itself from liability under the FTCA for its employees' negligence in performing congressionally authorized — or indeed, required — functions. All

the agency need do is employ the simple device of adopting a regulation proclaiming that the agency has no duty to the intended beneficiaries of its acts done in furtherance of the congressionally established program. That disclaimer would, under the approach taken below, automatically preclude liability under the Good Samaritan doctrine and the negligence *per se* doctrine, which require that a claimant be within the class intended to be benefitted or protected.[7] This device would foreclose FTCA liability under those doctrines.[8] And, under the construction of the "discretionary

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[7] The Good Samaritan or "voluntary undertaking" doctrine is summarized in *Restatement (Second) of Torts* §323:

> "One who undertakes, gratuitously or for consideration, *to render services to another which he should recognize as necessary for the protection of the other's person or things*, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> "(a) his failure to the exercise such care increases the risk of such harm, or
>
> "(b) the harm is suffered because of the other's reliance upon the undertaking." (Emphasis added)

The negligence *per se* doctrine, as summarized in §286 of the *Restatement*, provides:

> "The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively *or in part*
>
> "(a) *to protect a class of persons which includes the one whose interest is invaded*, and
>
> "(b) to protect the particular interest which is invaded, and
>
> "(c) to protect that interest against the kind of harm which has resulted, and
>
> "(d) to protect that interest against the particular hazard from which the harm results." (Emphasis added)

[8] The Good Samaritan doctrine in particular has frequently been a source of liability under the FTCA. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Moody v. United States*, *supra*, 774 F.2d at 155 n.6 (App. A at 10a n.6); *Canipe v. Nat'l Loss Control Service Corp.*, 736 F.2d 1055 (5th Cir. 1984).

function" exception adopted by the court below, the regulation would have preclusive effect even if it is invalid.

The court below treated the invalidity of the regulation as irrelevant, because the torts require reliance or membership in the class of beneficiaries, but according to the court the mere promulgation of the disclaimer preempted those elements. Plaintiffs, however, have alleged as a matter of fact that they did not know of the disclaimer, believed that the inspections were intended at least in part to protect them, and actually relied on the FmHA approvals. It would disserve the purposes of both the Housing Act and the FTCA to deny relief to injured borrowers who actually relied on FmHA inspections, solely because the agency illegally renounced its duty to the people it was created to aid.

Unless the Court grants review and reverses the decision below, executive agencies will be able to issue regulations effectively exempting themselves from entire areas of tort liability under the FTCA. As this Court has long recognized, however, the authority to create exceptions to the FTCA rests solely with Congress. There is "no justification for [federal courts]" — and even less justification for executive agencies — "to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957).

In a setting virtually identical to the one here, the Court in *Block v. Neal*, *supra*, observed that even explicit exemption from FTCA liability "involves hardship enough" and the Court declined to tolerate a "refinement of construction" that "would encourage the Government to shield itself completely from tort liability . . . " 460 U.S. at 298. The issue now is whether executive agencies have legitimately created a device to do just that.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1986

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-5479 & 84-5695

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

VIOLA MOODY, et al. (84-5479), GEORGE D. BAWGUS, et al. (84-5695),
Plaintiffs-Appellants,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed October 8, 1985

Before: CONTIE and WELLFORD, Circuit Judges; and EDWARDS, Senior Circuit Judge.

CONTIE, Circuit Judge. Plaintiffs Viola Moody, George Bawgus *et al.* appeal orders of the district courts granting judgment for the United States in plaintiffs' actions pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.* claiming negligent supervision and inspection of their homes by employees of the Farmers Home Administration (FmHA) pursuant to the Housing Act of 1949. We affirm.

I.

A.

On May 19, 1980, Viola Moody applied for a rural housing loan from the FmHA office for Campbell County, Tennessee. Moody's application was approved and a loan of $29,400.00 was used to purchase a house on Lot No. 78 in the Valley View Estates Subdivision in Campbell County. A deed of trust and promissory note dated July 10, 1980 provided:

> This Note [instrument] shall be subject to the present regulations of the Farmers Home Administration and to its future regulations not inconsistent with the express provisions hereof.

The home purchased by Moody was inspected three times with no deficiencies reported.

On January 6, 1984, Moody and her mother, Hiley Shoffner, filed a complaint pursuant to the Federal Tort Claims Act seeking "damages arising from the negligent acts omissions of officers and employees of Defendant United States of America in the performance of contractual and statutory duties and undertakings." Moody alleged that after she began living in the residence she discovered that the soil was inappropriate for a residential dwelling and subsurface sewage disposal system, and that the dwelling was unfit for human habitation. Moody alleged that "[t]he site development and construction of the house had been inspected and approved by FmHA," and that "[a]t the time of her application, the Plaintiffs believed that the involvement of federal officials in the construction of their home would assure compliance with all state, local, and federal building codes." Further,

> FmHA officials and employees undertook to perform a duty which was consistent with its statutory authorization to provide safe and decent housing. The FmHA's undertaking pursuant to the statutes and regulations, was

> to provide technical assistance to Viola Moody, including supervision and inspection of site development, dwelling construction, and individual water/sewerage system. Viola Moody justifiably relied on the undertakings of the FmHA to inspect the property with due care, to determine its safety, and to provide technical advice and assistance when necessary. FmHA officials and employees failed to exercise due care in providing technical assistance, supervision and inspection.

Moody and Shoffner alleged that their personal property was damaged and that they suffered personal injuries in the form of nervousness, nausea, and difficulty in breathing.

On March 12, 1984, the United States moved to dismiss or for summary judgment and, on April 19, 1984, the district court granted the motion. 585 F. Supp. 286 (E.D. Tenn. 1984). Moody premised her argument on the Good Samaritan doctrine of Restatement (Second) of Torts § 323. However, the district court found that reliance was an element of an action under that doctrine, and that 7 C.F.R. § 1924.9 (a), (b)(5) provides that inspections are for the FmHA's benefit only and that the borrower is required to inspect to protect her interest. The court held that the regulation precluded Moody from relying on the FmHA inspections, and, therefore, that summary judgment was appropriate. On May 15, 1984, the pendent state claims were dismissed, and Moody appealed.

B.

On June 3, 1981, George and Patricia Bawgus applied for a rural housing loan from the FmHA office for Washington County, Tennessee.[1] On July 1, 1981, a conditional com-

[1] Similar loans were sought by Rosie Overbay, Martha Briggs, Toney and Whitney Clouse, Steven and Kathy Hartley, Donnie and Teresa Campbell, and Raymond and Viva Clark (hereafter, "the borrowers"). Facts respecting these loans are not reviewed hereafter

mitment was issued noting that there would be three stages of inspection. The commitment provided:

> The construction must be completed in accordance with the MPS [Minimum Property Standards], drawings and specifications or description of materials submitted with the application.
>
> The Farmers Home Administration will, if the construction is completed in accordance with the terms of the conditional commitment, approve the house as suitable for a rural housing loan. . . .

The inspections were conducted between September 3, 1981 and October 29, 1981. On November 13, 1981, after construction was complete, the Bawguses signed a promissory note and deed of trust with provisions incorporating FmHA regulations similar to those in Moody's documents. The Bawguses contend that they were never informed that the inspections were solely for FmHA's benefit and thought they were for their benefit as well. Each of the borrowers purchased a lot and house within a subdivision of property owned by Sam Pate and John Kenney d/b/a Rock Creek Builders.

On May 19, 1983, the borrowers filed a complaint pursuant to the FTCA against the United States and the contractors of the homes on Frank Lowe Road in Jonesboro, Tennessee. In a 51-page complaint the plaintiffs alleged that in each case the FmHA inspected the home and in each case such dwelling was defective. The primary defect was water drainage which rendered the houses uninhabitable. The borrowers alleged:

> 60. FmHA, through its employees, undertook the supervision and inspection of the construction of the plaintiffs' homes.

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since no dispositive features of the home acquisition process distinguish these claims from those of the Bawguses. We note that the houses purchased by the Hartleys and Campbells were built under contract rather than conditional commitment.

> 61. FmHA defendants failed to exercise reasonable care in their supervision and inspection of the construction of the plaintiffs' homes, thereby directly and proximately causing the plaintiffs to suffer substantial damages.

Plaintiffs alleged mental and physical stress as personal injuries in addition to property damage.[2] The answer asserted, among other defenses, that plaintiffs' remedy pursuant to 42 U.S.C. § 1479(c) is exclusive, and that the inspections constituted a discretionary function pursuant to 28 U.S.C. § 2680.

On February 27, 1984, the United States moved for judgment on the pleadings pursuant to Fed. R. Civ. Pro. 12(c). On March 23, 1984, the magistrate issued a recommendation recommending denial of the government's motion. On April 9, 1984, Judge Hull adopted that report and denied the motion. The United States sought reconsideration after Judge Taylor issued his opinion in *Moody*, and Judge Hull granted the government's motion in accordance therewith. This court consolidated the cases for appeal.

II.

Pursuant to Section 501 of the Housing Act of 1949, the Secretary of Agriculture is authorized "to extend financial assistance, through the Farmers Home Administration . . . to rural residents . . . in order to enable them to provide dwellings and related facilities for their own use." 42 U.S.C. § 1471(a)(2). Section 501(c) specifies the conditions of

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[2] The borrowers alleged that after they moved into their homes constructed on lots in the Pate and Kenney subdivision, they experienced water drainage problems. After rains, water flooded the crawl spaces under their homes, would not drain off the property, and became stagnant and a breeding ground for insects. Driveways became unusable, yards became sinkholes, and earth pulled away from foundations and became unstable. Foundations cracked, house walls cracked, ceilings sagged, exterior paint peeled, sidewalks and steps separated from foundations, floor joists warped or buckled, and septic tanks failed.

eligibility for such loans.[3] Further, 42 U.S.C. § 1476(a) provides:

> In connection with financial assistance authorized in this subchapter, the Secretary shall require that all new buildings and repairs financed under this subchapter shall be substantially constructed and in accordance with such building plans and specifications as may be required by the Secretary. Buildings and repairs constructed with funds advanced pursuant to this subchapter shall be supervised and inspected as required by the Secretary. In addition to the financial assistance authorized in this subchapter, the Secretary is authorized to furnish, through such agencies as he may determine, to any person, including a person eligible for financial assistance under this subchapter, without charge or at such charges as the Secretary may determine, technical services such as building plans, specifications, construction supervision and inspection, and advice and information regarding farm dwellings and other buildings.

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[3] In order to be eligible for the assistance authorized by subsection (a) of this section, the applicant must show (1) that he is the owner of a farm which is without a decent, safe, and sanitary dwelling for himself and his family and necessary resident farm labor, or for the family of the operating tenant, lessee, or sharecropper, or without other farm buildings adequate for the type of farming in which he engages or desires to engage, or that he is the owner of other real estate in a rural area or a rural resident without an adequate dwelling or related facilities for his own use or buildings adequate for his farming operations, or that the applicant is an elderly or handicapped person or family in a rural area without an adequate dwelling or related facility for its own use, or that he is the owner of a farm or other real estate in a rural area who needs refinancing of indebtedness described in clause (4) of subsection (a) of this section; (2) that he is without sufficient resources to provide the necessary housing and buildings on his own account; and (3) that he is unable to secure the credit necessary for such housing and buildings from other sources upon terms and conditions which he could reasonably be expected to fulfill.

42 U.S.C. § 1471(c).

7 C.F.R. § 1924.5 specifies that development and construction must meet a variety of standards.[4] Section 1924.1 specifies that "[t]his subpart prescribes the basic Farmers Home Administration (FmHA) policies, methods, and responsibilities in the planning and performing of construction and other development work for insured Rural Housing (RH). . . ." Section 1924.5(f) provides:

> Planning construction and land development and obtaining technical services in connection with drawings, specifications, and cost estimates are the responsibility of the applicant, with such assistance from the County Supervisor or District Director, (whichever is the appropriate loan processing and servicing officer for the type of loan involved), as may be necessary to be sure that the development is properly planned in order to protect FmHA's security.

Subsection (f)(2) describes the responsibilities of the FmHA County Supervisor or District Director which include advising "the applicant regarding drawings, specifications, cost estimates and other related material."

7 C.F.R. § 1944.45 defines a conditional commitment as an "assurance from FmHA to a qualified builder or seller that a dwelling to be built or rehabilitated and offered for sale will be acceptable for purchase by qualified RH loan applicants if built in accordance with FmHA approved plans and specifications." Subsection (f)(3)(ii) provides that "[t]he County Supervisor will . . . [d]etermine whether the dwelling and site meet the requirements of this Subpart and Subpart A of Part 1924 of this Chapter and will comply with all local codes and ordinances. The property must meet the requirements of Subpart D or Part 1804 of this Chapter. . . ." Fur-

[4] 7 C.F.R. § 1804.66 sets out general regulations with respect to water and waste disposal systems.

ther, subsection (i)(2) provides that "[c]onditional commitments will be cancelled when construction is not in accordance with all FmHA requirements, approved plans, specifications, or MPS. . . ." Subsection (g) provides that "[i]nspections of work to be done will be performed in accordance with Subpart A of Part 1924 of this Chapter."

7 C.F.R. § 1924.9 provides for three stages of inspection and provides that "[t]he County Supervisor . . . will be responsible for following up on the correction of deficiencies. . . ." Most relevant to this action, however, subsection (a) provides:

> The County Supervisor or District Director, accompanied by the borrower when practicable, will make final inspection of all development work and periodic inspections as appropriate to protect the security interest of the government. In this respect, inspections other than final inspections, may be conducted by other qualified personnel as authorized under agreements executed by or authorized by the National Office. The borrower will be responsible for making inspections necessary to protect the borrower's interest. *FmHA's inspections are not to assure the borrower that the house is built in accordance with the plans and specifications. The inspections create or imply no duty or obligation to the particular borrower* but are, rather, for the dual purposes of determining that FmHA has adequate security for its loan and enabling FmHA to determine that FmHA is working toward achieving the statutory goal of providing adequate housing.

(Emphasis added). Further, subsection (b)(5) provides that "[t]he borrower should make enough periodic visits to the site to be familiar with the progress and performance of the work, in order to protect the borrower's interest."

While the district courts principally dealt with appellants' allegations of negligent inspection, the courts applied similar rationales in disposing of appellants' arguments respecting

negligent supervision and negligent provision of technical assistance. Accordingly, we consider these claims.

III.

28 U.S.C. § 2674 provides in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . .

Our jurisdiction over FTCA claims is conferred by 28 U.S.C. § 1346(b) which provides in pertinent part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

This section constitutes a waiver by the United States of its sovereign immunity. *Feyers* v. *United States*, 749 F.2d 1222, 1225 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2655 (1985).

"Whether a claim could be made out [under the FTCA] would depend upon whether a private individual under like circumstances would be liable under state law. . . ." *United States* v. *Muniz*, 374 U.S. 150, 153 (1963). "[The Act] was designed to build upon the legal relationships formulated and characterized by the States. . . ." *Richards* v. *United States*, 369 U.S. 1, 7 (1962); *Aretz* v. *United States*, 604 F.2d 417, 431 n.18 (5th Cir. 1979) ("The Tort Claims Act deals with sovereign immunity – that is, with whether the United States

may be sued for certain torts; it does not define what are torts.").

Appellants assert that, under Tennessee law (the Good Samaritan doctrine and the negligence per se doctrine), issues of fact respecting liability exist sufficient to withstand the defendant's motions. We consider these contentions in turn.[5]

A.

While no Tennessee court has expressly adopted the Good Samaritan doctrine embodied in Restatement (Second) Torts § 323,[6] the doctrine's essential principle is reflected in Tennessee tort law. *Nidiffer* v. *Clinchfield Railroad Company*, 600 S.W.2d 242, 246 (Tenn. App. 1980) ("It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all. . . ." (quoting *Glanzer* v. *Shepard*, 233 N.Y. 236, 135 N.E. 275, 276 (1922)); *Howell* v. *Betts*, 211 Tenn. 134, 362 S.W.2d 924, 925 (1962) ("[A] duty has been imposed and defendant held liable to a plaintiff not in privity in a number of classes of cases, such as that of a supplier of goods or services which, if negligently made or rendered, are 'reasonably certain to place life and limb in peril.' *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382."). Our district

[5] Although the government's motion in *Bawgus* was for judgment on the pleadings pursuant to Fed. R. Civ. P 12(c), it is clear that matters outside the pleadings were presented; we, therefore, consider the court's decision as if entered on a motion for summary judgment, Fed. R. Civ. P. 56. Summary judgment is appropriate when the movant has shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "[T]he evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." *Smith* v. *Hudson*, 600 F.2d 60, 63 (6th Cir.), *cert. dismissed*, 444 U.S. 986 (1979).

[6] Section 323 has often been the source of FTCA liability. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64-65 (1955); *Pierce* v. *United States*, 679 F.2d 617, 621 (6th Cir. 1982); *Reminga* v. *United States*, 631 F.2d 449, 452 (6th Cir. 1980).

courts have reached a similar conclusion, *Arcon Corp.* v. *Liberty Mutual Insurance Co.*, 591 F. Supp. 15, 20 (M.D. Tenn. 1983); *Lemar* v. *United States*, 580 F. Supp. 37, 39 (W.D. Tenn. 1984); *contra Mosley* v. *United States*, 456 F. Supp. 671, 675 (E.D. Tenn, 1978) (pre-*Nidiffer*). *See also Neal* v. *Bergland*, 646 F.2d 1179, 1181-82 (6th Cir. 1981), *aff'd sub nom. Block* v. *Neal*, 460 U.S. 289 (1983).[7] The Fifth Circuit has reached a similar and analogous conclusion. *Canipe* v. *National Loss Control Service Corp.*, 736 F.2d 1055, 1060 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 965 (1985) (Restatement (Second) Torts § 324A). Since we conclude that plaintiffs state no claim for relief under the Good Samaritan doctrine, we need not decide whether Tennessee law recognizes the doctrine.

Section 323 provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

In *Neal*, we held that a plaintiff, similarly situated to appellants, stated claims pursuant to section 323 for negligent

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[7] The Supreme Court noted, however,:

> The Court of Appeals found that respondent stated a claim against the United States under the common-law Good Samaritan doctrine which is described in § 323 of the Restatement (Second) of Torts (1965). However, the court did not expressly find that Tennessee law recognizes this doctrine. . . .

460 U.S. at 294 n.3.

supervision and inspection under the Housing Act of 1949 and the regulations authorized thereunder, 42 U.S.C. § 1480 (k). 646 F.2d at 1184. However, subsequent to our decision in *Neal*, the FmHA revised the regulations to reflect that FmHA aid in planning the construction and in inspecting is only to protect the government's security interest in the homes. 7 C.F.R. §§ 1924.5(f), .9.

The principal element in applying Section 323(b) is the plaintiff's reliance on the government's undertaking.[8] *Lemar*, 580 F. Supp. at 40. *See also Cash* v. *United States*, 571 F. Supp. 513, 515 (N.D. Ga. 1983); *Park* v. *United States*, 517 F. Supp. 970, 977 (D. Ore. 1981). In other contexts, we have found reliance precluded by clear statutory or regulatory language. In *Raymer* v. *United States*, 660 F.2d 1136 (6th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982), plaintiff cited as negligent the action of Bureau of Mines inspectors in granting an operator an extension of time to correct a safety violation. The court found that it was unreasonable for a plaintiff to rely on the inspectors when the statute placed primary responsibility for compliance with safety standards on the operators. *Id.* at 1143. Further, regulations published in the Code of Federal Regulations "have the force and effect of law, and all persons affected thereby are charged with legal notice of their provisions." *Adamsville Lumber Company* v. *Rainey*, 348 F. Supp. 373, 376 (W. D.

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[8] It is clear that federal regulations can create the duty or undertaking which state law requires be performed with reasonable care. *Art Metal-U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1158-59 (D.C. Cir. 1985); *Sellfors* v. *United States*, 697 F.2d 1362, 1367 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 3571 (1984); *Canadian Transport Co.* v. *United States*, 663 F.2d 1081, 1091 (D.C. Cir. 1980). We addressed this issue in *Schindler* v. *United States*, 661 F.2d 552, 560 (6th Cir. 1981), where the court held that while "[i]t is clear that usually the federal regulatory statute is not the source of a private right of action," "[t]he federal statute or regulation may well be relevant to the analysis of the state cause of action" under § 323. (footnote omitted). "[T]he federal regulatory statute may be relevant in defining the scope of the undertaking of the United States and the plaintiff's right to rely thereon." *Id.* (footnote omitted).

Tenn. 1972) (Wellford, J.). *See also Ramey* v. *Block*, 738 F.2d 756, 762 (6th Cir. 1984).

The FmHA's undertaking to inspect and the limitations thereon are clearly set out in 7 C.F.R. § 1924.9.[9] Appellants cannot premise liability on the voluntary undertaking represented by the regulations independent of the limitations expressly circumscribing that undertaking. Accordingly, we conclude that the plain language of that regulation indicating that inspection is for the government's benefit precludes reasonable reliance by appellants on such inspection, and establishes that no issue of material fact exists.

Our review of the complaints and briefs in this case reveal no factual basis to support an undertaking by the government to supervise construction apart from those undertakings on

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[9] Appellants argue that the regulation at issue, 7 C.F.R. § 1924.9, is invalid because it conflicts with Congressional intent in enacting the Housing Act of 1949. However, the FTCA itself makes clear that an action for damages may not be premised on the invalidity of a regulation. 28 U.S.C. § 2680(a) provides in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, *whether or not such statute or regulation be valid*. . . .

(emphasis added). "[T]he act provides that the actions of government employees acting within a statutory or regulatory framework are not a basis for a claim even if the statute or regulations be invalid." *Dupree* v. *United States*, 247 F.2d 819, 824 (3d Cir. 1957).

> [T]he Tort Claims Act did not contemplate "that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort." Nor did it contemplate a remedy for damages sustained by reason of the application of invalid laws or regulations. . . . Since his claim is based upon nothing more than the invalidity of the regulations . . . it is precisely the type of claim which Congress intended to exclude. . . .

Id. at 824-25 (footnote omitted). *See also Hatahley* v. *United States*, 351 U.S. 173, 181 (1956); *Dupree* v. *United States*, 264 F.2d 140 (3d Cir.), *cert. denied*, 361 U.S. 823 (1959); *Dalehite* v. *United States*, 346 U.S. 15, 33 (1953).

which appellants' are precluded from relying.[10] Section 1924.9(b) provides that inspection is for the government's benefit and section 1924.5(f) provides likewise with respect to FmHA assistance in planning construction and obtaining technical services. Accordingly, these regulations preclude appellants' reliance on FmHA's actions in those regards. Therefore, to the extent that a duty to supervise is alleged, we concur in the judgment of the district courts that no issue of material fact exists respecting the government's liability under the Good Samaritan doctrine.

B.

Appellants contend that the Tennessee doctrine of negligence per se can provide a source of liability pursuant to the FTCA. *Art Metal-U.S.A., Inc.*, 753 F.2d at 1159; *Schindler*, 661 F.2d at 561; *Insurance Company of North America* v. *United States*, 527 F. Supp. 962, 967 (E.D. Ark. 1981); *Doe* v. *United States*, 520 F. Supp. 1200, 1202 (S.D. N.Y. 1981).

> It is a well settled proposition of law that failure to perform a statutory duty is negligence per se, and if injury is the proximate result or consequence of this negligent act, there is liability. However, the person suing must be such a person as is within the protection of the law and intended to be benefited thereby.

Berry v. *Whitworth*, 576 S.W.2d 351, 353 (Tenn. App. 1978); *Davidson* v. *Power Board of the City of Pulaski*, 686 S.W.2d 581, 585-86 (Tenn. App. 1984); *Tennessee Farmers Mutual Insurance Co.* v. *Hinson*, 651 S.W.2d 235, 238 (Tenn. App. 1983); *Traylor* v. *Coburn*, 597 S.W.2d 319, 322 (Tenn. App.

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[10] We note that in some cases the FmHA has made an explicit undertaking to supervise. *See* 7 C.F.R. § 1924.59. However, that duty or undertaking applies only to a limited class of borrowers to which appellants do not allege that they belong. 7 C.F.R. § 1924.51 ("borrowers who depend on farm income for loan repayment").

1980).[11] In *Teal* v. *E. I. DuPont de Nemours and Co.*, 728 F.2d 799 (6th Cir. 1984), this court, applying Tennessee law, held that, pursuant to the doctrine of negligence per se, an employer could be held liable for violation of an OSHA regulation. *Id.* at 802-04. Accordingly, since under Tennessee law a private individual could be held liable for violation of a federal regulation, the United States under the FTCA is exposed to similar liability.[12]

The regulations cited as establishing the duty to inspect and supervise inherently limit the scope of those duties and make clear that the government rather than the borrower is the party which the regulations are intended to protect. This is patently clear from the language of the regulations, upon which appellants' claims are based.[13] Accordingly, the

[redacted]

[11] Restatement (Second) of Torts § 286 provides a more detailed and precise elucidation of the negligence per se doctrine.

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

[12] The government's argument that it cannot be held liable because state law would not make a governmental entity liable for such acts has been rejected since the FTCA imposes on the United States the same liability as a private individual. *Schindler*, 661 F.2d at 560; *Raymer* v. *United States*, 660 F.2d 1136, 1140 (6th Cir. 1981). *See however Jayvee Brand, Inc.* v. *United States*, 721 F.2d 385, 390 (D.C. Cir. 1983).

[13] The statute provides only that buildings "shall be supervised and inspected as required by the Secretary," 42 U.S.C. § 1476(a), and, therefore, provides no standard of care to which the negligence per se doctrine could be applied. We, of course, would have no

regulations, under the facts presented by the parties, preclude the existence of any material facts regarding the government's liability pursuant to the negligence per se doctrine. Therefore, we find that the district courts did not err in granting the motions for summary judgment.[14]

Accordingly, the judgment of the district courts are AFFIRMED.

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jurisdiction to consider an action under the doctrine of negligence per se based on the statute and incorporating the standards of care set out in the regulations, since such an action would, under these facts, be based on a challenge to the validity of the regulation. *See, supra* note 9.

[14] Our holding does not leave appellants without remedy. Congress has provided appellants with an administrative remedy, 42 U.S.C. § 1479(c), for claims arising from defects in housing purchased with FmHA funds. In light of our disposition of the case, we, like the Supreme Court, decline to decide whether 42 U.S.C. § 1479(c) provides an exclusive remedy for appellants' claims. *Block* v. *Neal*, 460 U.S. at 294-95 n.4. The district courts did not address this issue.

APPENDIX B

No. CIV. 3-84-31

United States District Court

E.D. TENNESSEE, N.D.

VIOLA MOODY AND HILEY SHOFFNER

v. *Plaintiffs,*

UNITED STATES OF AMERICA AND
BILL COX AND CHARLES E. COX. D/B/A
ALCO BUILDERS

Defendants.

April 19, 1984

MEMORANDUM

ROBERT L. TAYLOR, Chief Judge,

This is a case under the Federal Tort Claims Act [FTCA], 28 U.S.C. §§ 2671-2680, for damages arising from alleged negligent supervision and inspection of the site development, dwelling construction, and water/sewerage system of Viola Moody's residence. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1346(b). The case is before the Court on the defendant United States's motion to dismiss or for summary judgment.

Ms. Moody purchased her home on July 10, 1980, for $29,900, with financial assistance provided through the Farmers Home Administration [FmHA], an agency of the Department of Agriculture, pursuant to Title V of the Housing Act of 1919, as amended, 42 U.S.C. § 1471, *et seq.* Ms. Moody and her mother (plaintiff Hiley Shoffner), who lives with her,

complain that Ms. Moody's house and lot are defective. They claim property damage and personal injury totaling $150,000.

Plaintiffs say that, pursuant to defendant's statutory authorization to provide safe and decent housing for low-income rural residents, 42 U.S.C. §§ 1471(a) and 1476(a), defendant undertook to supervise and inspect the construction of Ms. Moody's house for plaintiffs' benefit and that it did so negligently. Defendant says the complaint should be dismissed or summary judgment granted.

[1]. Defendant says plaintiff Shoffner's claim must be dismissed for lack of subject matter jurisdiction for failure to timely file an administrative claim. Prior to bringing a lawsuit under the FTCA, an administrative claim must be filed with the appropriate federal agency. *Allen* v. *United States*, 517 F.2d 1328 (6th Cir.1975). The manner of presenting an administrative claim under the FTCA is prescribed by 28 C.F.R. 14.2(a), which has been held to be a valid regulation. *Id.* at 1329. This regulation provides that a claim must be presented in writing to the appropriate federal agency by claimant or his duly authorized agent or legal representative and must claim money damages in a sum certain. 28 C.F.R. 14.2(a). When a claim is presented by an agent or legal representative, the claim must be presented in the name of the claimant, be signed by the agent or legal representative, and be accompanied by evidence of his authority to act on behalf of the claimant. 28 C.F.R. 14.3(e).

[2]. In this case, a letter was written by an attorney for Ms. Moody to the Department of Agriculture, which stated: "This is a claim under the Federal Tort Claims Act . . . made on behalf of Viola Moody . . . " (Exhibit 2 of defendant's motion). The letter further states, "[c]laim is made for damages to Ms. Moody . . . " *(Id.)*. In the next paragraph the letter states, "[b]y reason of the negligence of the [FmHA], Ms. Moody and her 92-year old mother have suffered personal injuries in the amount of $10,000." Plaintiffs say that this written notification, although not expressly filed on behalf of Ms. Hiley Shoffner, refers to Ms. Hiley Shoffner by

name and states a sum certain for damages, and therefore, meets the requirements of 28 C.F.R. 14.2. The Court disagrees. First, the letter refers to Ms. Shoffner not by name but only as Ms. Moody's 92-year old mother. Second, because this claim was filed by a legal representative, the requirements of 28 C.F.R. 14.3(e) must be met. Those requirements, previously stated, have not been met in this case because the letter does not show that the attorney was acting on behalf of Hiley Shoffner. The letter is signed "Sue Ellen Prater, Attorney for Viola Moody." (Exhibit 2 of defendant's motion). There is no indication in the letter that the attorney was acting or had authority to act on behalf of Hiley Shoffner. The Court finds that the written notification on behalf of Viola Moody was not sufficient notice to the government that Hiley Shoffner intended to file an administrative claim. *See Johnson* v. *U.S.*, 496 F. Supp.597, 601 (D.Mont.1980), *modified* 704 F.2d 1431 (9th Cir.1983); *Walker* v. *U.S.*, 471 F. Supp. 38, 41-42 (M.D.Fla.1978), *aff'd* 597 F.2d 770 (11th Cir.1979). Therefore, plaintiff Hiley Shoffner's claim must be dismissed for lack of subject matter jurisdiction due to her failure to file an administrative claim.

Defendant says further that it owed no duty to inspect plaintiff Moody's home and did not assume the duty. Thus, defendant says it is entitled to summary judgment.

Under the Housing Act the FmHA is authorized to provide financial assistance and technical services such as construction supervision and inspection to achieve the goal of helping low-income rural residents to obtain decent, safe, and sanitary living conditions. 42 U.S.C. §§ 1471(a), 1476(a). Thus, plaintiff says that FmHA owed a duty to supervise and inspect the construction of her home. Alternatively, plaintiff says that if FmHA had no affirmative duty to supervise and inspect, it assumed the duty when it inspected her home and is liable under the Good Samaritan doctrine for its negligent performance of that duty.

[3]. The FmHA has no affirmative duty to inspect and supervise. *Neal* v. *Bergland*, 646 F.2d 1178, 1181 (6th

Cir.1981), *aff'd sub nom Block* v. *Neal*, 460 U.S. 289, 103 S.Ct. 1089, 75 L.Ed.2d 67 (1983). The Housing Act gives the FmHA a right to inspect, but such a right "without more does not imply an obligation to inspect." *Id.* (citation omitted). However, in *Neal*, because the Secretary of the Department of Agriculture had enacted regulations requiring inspection[1], the Sixth Circuit Court of Appeals held that FmHA had assumed the duty to inspect and under the Good Samaritan doctrine[2] could be liable for negligent inspection. *Id.* at 1181-1182.

Defendant says that the regulations applicable in *Neal* were subsequently amended by the Secretary to clarify the FmHA's limited role in the inspection process and to provide specifically that FmHA's inspections are not to protect the interest of the borrower. Thus defendant says that because the amended regulation was incorporated by reference into plaintiff's deed of trust and promissory note, plaintiff was precluded as a matter of law from relying on FmHA's inspection to protect her interest. Plaintiff says that defendant should not be able to hide behind the amended regulation

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[1] The regulations provided in pertinent part: (1) *Responsibility for Inspection:* The County Supervisor, accompanied by the borrower when practicable, will make final inspections as appropriate . . . .

(3) *Frequency of Inspections:* The County Supervisor will inspect development work as frequently as necessary to assure that construction and land developments conform with the plans and specifications . . . .

7 C.F.R. 1804.4(g) (1977). *See also* 7 C.F.R. 1802.73, 1802.74, 1822.7 (1977).

[2] One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965).

when the clear intent of Congress was that FmHA's inspection and supervision program is for the benefit of the borrower.

The Secretay has authority to make rules and regulations to carry out the purposes of Title V of the Housing Act. 42 U.S.C. § 1480(j). The purpose of Title V is to "provide rural residents with the opportunity for decent, safe, and sanitary housing." *Neal*, 646 F.2d at 1181. Supervision and inspection of homes purchased with funds advanced pursuant to Title V is for two purposes; to achieve the objectives of the loan program and to protect the government's security interest. *Id.* Supervision and inspection are to be conducted as required by the Secretary, 42 U.S.C. § 1476(a). The Secretary's amended regulation provides in pertinent part:

> (a) *Responsibility for inspection.* The County Supervisor or District Director, accompanied by the borrower when practicable, will make final inspection of all development work and periodic inspections as appropriate to protect the security interest of the government . . . .The borrower will be responsible for making inspections necessary to protect the borrower's interest. FmHA's inspections are not to assure the borrower that the house is built in accordance with the plans and specifications. The inspections create or imply no duty or obligation to the particular borrower but are, rather, for the dual purposes of determining that FmHA has adequate security for its loan and enabling FmHA to determine that FmHA is working toward achieving the statutory goal of providing adequate housing . . . .
>
> (b) *Frequency of inspections* . . .
>
> (5) The borrower should make enough periodic visits to the site to be familiar with the process and performance of the work, in order to protect the borrower's interest.
>
> 7 C.F.R. 1921.9(a), (b)(3), as amended by 45 Fed.Reg. 39789, 39803 (1980).

[4]. The Court finds that the regulation is consistent with the purposes of Title V of the Housing Act and that it is within the Secretary's statutory authority to provide that the borrower must inspect to protect her security interest. Because the regulation specifically provides that plaintiff must inspect to protect her interest, plaintiff was precluded as a matter of law from relying on FmHA's inspection to protect her interest: consequently, the Good Samaritan doctrine is inapplicable.[3] *Cash* v. *United States*, 571 F. Supp. 513, 515 (N.D. Ga 1943).

Defendant has raised other issues, but because the Court finds the above issue dispositive, the remaining issues will not be addressed. For the foregoing reasons, defendant's motion for summary judgment is granted.

Order Accordingly.

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[3] In this case, Reliance is an element of plaintiff's cause of action under the Good Samaritan doctrine against defendant. Restatement (Second) of Torts § 323(b). *See Block* v. *Neal*, 460 U.S. 289, 103 S.Ct. 1089, 1094 n.7, 75 L.Ed.2d 67 (1983).

APPENDIX C

No. CIV-2-83-145

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

GEORGE D. BAWGUS, *et al.*

Plantiffs,

v.

UNITED STATES OF AMERICA, *et al.*

Defendants.

MEMORANDUM AND ORDER

On April 9, 1984, this Court adopted a recommendation of the United States Magistrate and denied the defendant United States' motion for judgment on the pleadings. On careful reconsideration, and after much thought, this Court finds that this defendant is entitled to judgment on the pleadings. Rule 12(c) Federal Rules of Civil Procedure.

Plaintiffs, seven sets of homeowners who purchased homes with financial assistance from the Farmers Home Administration (FmHA), have sued the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671-2680, for negligence in its inspections and supervision of the construction of their homes. The defendant United States takes the position that 7 C.F.R. § 1924.9, incorporated by reference (only) into its contracts with the plaintiffs, shields it from liability for any negligence in its inspections of the FmHA homes.

The Court finds it very disturbing that the plaintiffs in this action were not specifically informed that the government's inspections were intended to protect the government's interest only. It is to be hoped that, in the future, the FmHA will be explicit with its borrowers on their duty to protect themselves. However, this Court is constrained to find that the

federal regulations at issue do relieve the government of any duty to the home builders and do shield it from any liability it might otherwise have incurred under Section 323 of the Restatement (Second) of Torts.

Accordingly, the motion for judgment on the pleadings, by the United States of America, is hereby GRANTED.

This Court finds it has no jurisdiction over the remaining defendants (contractors) and therefore this action is DISMISSED. Rule 12(b)(1), Federal Rules of Civil Procedure.

ENTER:

Thomas G. Hull

THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

FILED June 5, 1984

No. CIV-2-83-145

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

GEORGE D. BAWGUS, *et al.*

Plantiffs,

v.

UNITED STATES OF AMERICA, *et al.*

Defendants.

ORDER

The report and recommendation of the United States Magistrate is hereby adopted and approved. Accordingly, the defendant United States' motion for judgment on the pleadings is hereby DENIED.

ENTER:

Thomas G. Hull

THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

FILED April 9, 1984

No. CIV-2-83-143

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TENNESSEE

GEORGE D. BAWGUS, *et al.*

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*

Defendants.

REPORT AND RECOMMENDATION

This matter was referred to the undersigned United States Magistrate pursuant to 28 U.S.C. § 636(b) and the Rules of this Court for a report and recommendation regarding the disposition by the District Court of defendant, the United States of America's, motion for judgment on the pleadings. Rule 12(c), Federal Rules of Civil Procedure.

The plaintiffs in this action are seven sets of homeowners who, between July 23, 1981, and July 13, 1982, purchased homes in an area located in Jonesboro, Tennessee. These homes were purchased with financial assistance provided by the Farmers Home Administration (FmHA), an agency of the Department of Agriculture, pursuant to 42 U.S.C. § 1471, *et seq.* (Housing Act of 1949). Under the Act, the Secretary of Agriculture is authorized to extend financial assistance to rural residents in need of adequate housing who are unable to secure credit for such housing from other sources on reasonable terms. 42 U.S.C. § 1471(a) and (c). The Act also provides that buildings constructed with funds advanced by FmHA "shall be supervised and inspected as required by the Secretary." 42 U.S.C. § 1476(a).

The plaintiffs claim that the houses they purchased under the financial assistance program are defective. They have

sued the Secretary of Agriculture and various federal officials of the FmHA for alleged negligence in the performance of their duties and have sued the private contractors for breach of express warranty and negligent design, planning, construction, etc., of their homes and homesites. The plaintiffs seek recovery from the United States pursuant to the Federal Torts Claim Act, 28 U.S.C. §§ 2671-2680.

In 1980, a case presenting facts similar to those in the instant case arose in this District. *See Neal* v. *Bergland*, 489 F. Supp. 512 (E. D. Tenn. 1980). In *Neal* a FmHA borrower brought an action against the FmHA under the Tort Claims Act to recover for defects in a home purchased with the loan. This Court dismissed the plaintiff's complaint holding that no contractual duty to supervise the construction of respondent's home was created either by the Federal Housing Act of 1949 and the regulations promulgated thereunder or by various agreements between the plaintiff and the FmHA. *Id.* The Sixth Circuit reversed this decision, holding that although the FmHA had no contractual obligation to provide the plaintiff with technical assistance or to inspect and supervise construction of her house, 646 F.2d 1178, 1181 (6th Cir. 1981), the plaintiff had nevertheless stated a claim for negligence based on the principle "that one who undertakes to act, even though gratuitously, is required to act carefully and with the exercise of due care and will be liable for injuries proximately caused by failure to use such care." *Id.*, at 1181-1182, citing Restatement (Second) of Torts § 323 (1965). The Sixth Circuit also noted that, subject to express exceptions, the Tort Claims Act authorizes suits against the Government for the negligence of a federal agency in performing a voluntary undertaking. *Id.* at 1182.

The Supreme Court affirmed the decision in *Block* v. *Neal*, _____ U. S. _____, 103 S.Ct. 1089 (1983), but on grounds much narrower than those addressed by the Court of Appeals. The Court stated:

> The question before us is a narrow one. The Government argues only that respondent's claim is a claim of

> "misrepresentation" within the meaning of § 2680(h). It does not seek review of the threshold determination that respondent's complaint states a claim for negligence under the Good Samaritan doctrine that is otherwise actionable under 28 U.S.C. § 2674. Thus, we need not decide precisely what Neal must prove in order to prevail on her negligence claim, nor even whether such a claim lies. [footnote omitted] Nor are we called on to consider whether recovery is barred by any other provision of the Tort Claims Act, including the exception for any action "based upon the exercise or performance or the failure to exercise or perform a discretionary function." Id., § 2680(a). Finally, we are not asked to determine whether the administrative remedy created by the Housing Act of 1949, 42 U.S.C. § 1479(c) (1976 ed., Supp. IV), provides the exclusive remedy against the Government for damages attributable to the negligence of FmHA officials. [footnote omitted].

103 S.Ct. at 1092. In a footnote, the Court noted that the Court of Appeals did not expressly find that Tennessee law would recognize a Good Samaritan theory nor did it clearly identify what the plaintiff must show in order to prevail on such a claim. *Id.*, at n. 3. Ultimately, the Court determined that the plaintiff's claim did not "arise out of . . . misrepresentation" within the exception created by 28 U.S.C. § 2680(h) and concluded that the Court of Appeals was correct in not dismissing the plaintiff's claim.

Before proceeding to examine the parties' contentions, it may be helpful to briefly consider one of the questions left unanswered in *Block*: What is the law of the State of Tennessee with respect to the Good Samaritan doctrine? As in *Erie* doctrine cases, predicting state law is often a difficult task, at least in areas where that state's law is not clearly developed. That problem is apparently present here. The parties in their

briefs have not identified any Tennessee cases either recognizing or rejecting a Good Samaritan doctrine. Nor has preliminary research by the undersigned revealed any.[1] Without any input from counsel on this issue it would be premature for the undersigned to make a recommendation as to what Tennessee law is. However, for purposes of considering the defendent's motion, the undersigned will assume that Tennessee embraces the general common law rule set out in § 323 of the Restatement (Second) of Torts (1965). That rule follows:

> § 323. Negligent Performance of Undertaking to Perform Services
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical

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[1] A federal court setting in Tennessee applied what appears to be a form of the Good Samaritan Doctrine in an early case. The court was presented with a wrongful death action in which the decedent had been injured while a trespasser on railroad property. It was conceded that the railroad was not liable for the injuries (a severed leg and a lacerated leg). The action was brought because railroad employees undertook to assist the decedent, assumed control of his person but did so in a grossly negligent manner by putting him in an unheated boxcar for four hours. He died as a result. The Court held that the railroad could be held liable for the "wanton negligence" of its employees. *Slater* v. *Illinois Central Ry. Co.*, 209 F. 480, (Cir. Ct., M. D. Tenn. 1911). This case does not necessarily reflect application of Tennessee law, however, since it was decided before *Erie* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938). Another federal district court refused to recognize the Good Samaritan Doctrine in the context of a Federal Tort Claims case, *Mosely* v. *United States*, 456 F. Supp. 671, 675 (D.C. Tenn. 1978), but that is questionable. *Mosely* appears to state that the Good Samaritan Doctrine is not accepted as law in Tennessee. No Tennessee court has ever so stated to the undersigned's knowledge. It appears to be an open question. *Block* v. *Neal*, *supra*, 103 S.Ct. at 1092 n. 3.

harm resulting from his failure to exercise reasonable care to perform his undertaking; if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upons the undertaking.

If the *Block* decision and the preceding interpretation of Tennessee law were the only factors to be considered in the instant action, then clearly the defendant's motion would have to be denied. However, as the United States points out, the plaintiff in the *Block* case entered into her agreement with the FmHA and purchased her home prior to June 12, 1980, at which time the Secretary issued the following regulation:

(a) *Responsibility for inspection.* The County Supervisor or District Director, accompanied by the borrower when practicable, will make final inspection of all development work and periodic inspections as appopriate to protect the security interest of the government . . . The borrower will be responsible for making inspections necessary to protect the borrower's interest. FmHA's inspections are not to assure the borrower that the house is built in accordance with the plans and specifications. The inspections create or imply no duty or obligation to the particular borrower but are, rather, for the dual purposes of determining that FmHA has adequate security for its loan and enabling FmHA to determine that FmHA is working toward achieving the statutory goal of providing adequate housing. . . .

(b) *Frequency of inspections.* . . .

(5) The borrower should make enough periodic visits to the site to be familiar with the progress and performance of the work, in order to protect the borrower's interest. . . .

7 C.F.R. § 1924.9.

It is the position of the United States that the issuance of this regulation, which was purportedly incorporated by reference into the deeds of trust and promissory notes each of the plaintiffs executed, shields the FmHA from any potential liability under a Good Samaritan theory since the new regulations clearly indicate that it is the responsibility of the borrower to make inspections to protect his or her interest, the FmHA's inspection being only to protect its own interest. Thus, the United States argues, this new regulation undercuts the foundation of the plaintiffs' Good Samaritan cause of action; that is, that the United States voluntarily undertook a duty to supervise and inspect the construction of the plaintiffs' homes for the plaintiffs' benefit.

The effect of 7 C.F.R. § 1924 has been considered in another recent district court case involving a fact situation similar to that in the instant case. *Cash* v. *United States*, 571 F. Supp. 513 (N.D. Ga. 1983). That court held that,

> The amended regulations in effect at the time the plaintiffs obtained financing through FmHA clearly and unequivocally indicate that it is the responsibility of the borrower to make those inspections necessary to protect his interest. This court therefore concludes that plaintiffs were precluded as a matter of law from relying on FmHA's inspections to protect their interests and consequently, the common law Good Samaritan doctrine which is described in § 323 of the Restatement (Second) of Torts is inapplicable. Furthermore, the court concludes that the statutory provisions found at 42 U.S.C. § 1471 *et seq.* are insufficient in and of themselves to create a duty owed by FmHA to plaintiffs. Accordingly, the motion to dismiss the FTCA claim of plaintiffs will be granted . . . .

Id., at 515.

The undersigned respectfully disagrees with the conclusion reached in the *Cash* case, at least to the extent that it would apply to the facts of the instant case.

Section 323 of the Restatement (Second) of Torts, like most tort concepts, makes use of an objective "reasonable man" standard rather than the subjective motives or hidden purposes of the parties. Under § 323, the Good Samaritan renders services "to another which he *should recognize* as necessary for the protection of the other's person." (emphasis added). The recipient of the services is given protection because the Good Samaritan's conduct increases the recipient's risk or induces his reliance. Whether the Good Samaritan subjectively intends his services to be for the recipient's benefit or his own benefit, or for the benefit of both is immaterial as long as he should recognize those services as necessary to protect the other's interest.

By way of example, suppose a physician stopped to render aid to a man who had fallen ill in the street. When the physician arrived upon the scene the fallen man was surrounded by a crowd of onlookers. Suppose the physician's purpose in stopping was purely selfish. His only purpose was to be recognized as a hero and get his name in the newspaper. Assume further that because of the physician's arrival on the scene the crowd presumed that the emergency was over and dispersed. If the physician then abandoned his undertaking, causing the victim's death, he might be liable under the Good Samaritan theory even though his subjective purposes were purely selfish. Similarly, the FmHA's subjective or internal notions concerning the purposes of the inspections are immaterial.

Apparently, the *Cash* court was of the opinion, and it is the theory of the defendant, that publishing 7 C.F.R. § 1924 put the plaintiffs on notice that the inspections were not intended for their benefit in any way. The undersigned cannot say as a matter of law that it would be reasonable to charge the plaintiffs with knowledge of the entire Code of Federal Regulations with respect to the Farmers Home Administration. While the law charges individuals with knowledge of criminal statutes or regulations, the applicability of the Good Samaritan Doctrine to the instant case is governed by tort principles and their objective "reasonable man" standards.

The defendant also relies on language included in each of the plaintiffs' deeds of trust and promissory notes to charge the plaintiffs with knowledge of the FmHA's purpose. The deed of trust contained only the following with respect to the purpose of the inspections:

> (25) This instrument shall be subject to the present regulations of the Farmers Home Administration, or to its future regulations not inconsistent with the express provisions hereof.

(Complaint, Exs. E, K, R, Z, HH, CO, and VV). The promissory notes contain similar language. The undersigned cannot say as a matter of law that those clauses are enough to prevent the defendant from being subject to Good Samaritan negligence liability. It appears unlikely to the undersigned that the average rural home buyer would even be aware of where those regulations could be found.

The crux of the problem seemingly can be boiled down to this: Can the government unilaterally remove itself from possible liability under § 323 of the Restatement (Second) of Torts (1965) simply by rewriting its regulations to say, in effect, that its inspections and supervision create no duty to the borrower. The undersigned is of the opinion that it cannot avoid such liability solely on this basis.

The § 323 liability discussed by the United States Court of Appeals for the Six Circuit in *Neal* v. *Bergland* was premised on the FmHA's alleged failure to use due care in a voluntary undertaking, *i.e.*, the inspection and supervision of the construction of the plaintiff's house. 646 F.2d at 1194. The Court made it clear that the government's right to inspect did not imply an obligation or duty to inspect. 646 F.2d at 1181. Thus, regardless of what the regulations say, if the government does in fact inspect and supervise, it has done so on a voluntary basis. The duty to inspect and supervise and to do it with reasonable care came not from any statute or regulation, but rather from the government's voluntary undertaking to conduct inspections and to supervise. 646 F.2d at 1184. Thus, the status of the Secretary of Agriculture's regulations either

imposing a duty on the FmHA to the homeowner or purporting to nullify any such duty has only a limited bearing on the duty recognized under *Neal* v. *Bergland* — a duty which may arise as a matter of state substantive tort law. It is the law of the State of Tennessee which is in issue and not any statement of the law in the Secretary's regulations. *See* 28 U.S.C. § 2672.

For example, if the proof shows that the plaintiffs were, or should have been, aware of the regulation and, therefore, that the FmHA was not assuming any responsibility to the plaintiffs by virtue of its inspections and supervision of the construction, then the plaintiffs would not have shown that the FmHA's conduct increased the risk of plaintiffs' harm or that the plaintiffs relied on the FmHA's undertaking. There would be no § 323 liability in such case. On the other hand, the unilateral issuance of 7 C.F.R. § 1924 by the Secretary did not *ipso facto* nullify the duty recognized by the Sixth Circuit in *Neal* v. *Bergland*. The facts need to be developed before this action can be decided.

Based on the foregoing, it is the recommendation of the undersigned that the defendant United States' motion for judgment on the pleadings be DENIED.[2]

Respectfully submitted,

Robert P. Murrian

ROBERT P. MURRIAN
UNITED STATES MAGISTRATE

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[2] Any objections to this report and recommendation must be filed within 10 days of its service or further appeal will be waived. 28 U.S.C. § 636 (b) (1) (2) and (C). *United States* v. *Walters*, 638 F.2d 947-950 (6th Cir. 1981).

APPENDIX D

No. 84-5479/5695

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

VIOLA MOODY, ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees

ORDER

BEFORE: CONTIE AND WELLFORD, Circuit Judges, and EDWARDS, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman

JOHN P. HEHMAN, CLERK

FILED November 19, 1985

APPENDIX E

1. The Housing Act of 1949, 42 U.S.C. §§ 1441 *et seq.*, provides in pertinent part:

§ 1441. Congressional declaration of national housing policy

The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. The Congress further declares that such production is necessary to enable the housing industry to make its full contribution toward an economy of maximum employment, production, and purchasing power. The policy to be followed in attaining the national housing objective established shall be: (1) private enterprise shall be encouraged to serve as large a part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need; (3) appropriate local public bodies shall be encouraged and assisted to undertake positive programs of encouraging and assisting the development of well-planned integrated residential neighborhoods, the development and redevelopment of communities, and the production, at lower costs, of housing of sound standards of design, construction, livability, and size for adequate family life; (4) governmental assistance to eliminate substandard and other inadequate housing through the clearance of slums and blighted areas, to facilitate community development and redevelopment, and to provide adequate housing for urban and rural nonfarm families with incomes so low that they are not being decently housed in new or existing housing shall be extended to those localities which estimate their own needs and demonstrate that these needs are not being met through reliance solely upon private enterprise, and without such aid; and (5) governmental assistance

for decent, safe, and sanitary farm dwellings and related facilities shall be extended where the farm owner demonstrates that he lacks sufficient resources to provide such housing on his own account and is unable to secure necessary credit for such housing from other sources on terms and conditions which he could reasonably be expected to fulfill. The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist (1) the production of housing of sound standards of design, construction, livability, and size for adequate family life; (2) the reduction of the costs of housing without sacrifice of such sound standards; (3) the use of new designs, materials, techniques, and methods in residential construction, the use of standardized dimensions and methods of assembly of home-building materials and equipment, and the increase of efficiency in residential construction and maintenance; (4) the development of well-planned, integrated, residential neighborhoods and the development and redevelopment of communities; and (5) the stabilization of the housing industry at a high annual volume of residential construction.

§ 1471. Financial assistance by Secretary of Agriculture

Authorization and purposes of assistance

(a) The Secretary of Agriculture (hereinafter referred to as the "Secretary") is authorized, subject to the terms and conditions of this subchapter, to extend financial assistance, through the Farmers Home Administration, (1) to owners of farms in the United States and in the Territories of Alaska and Hawaii and in the Commonwealth of Puerto Rico, the Virgin Islands, the territories and possessions of the United States, and the Trust Territory of the Pacific Islands, to enable them to construct, improve, alter, repair, or replace dwellings and other farm buildings on their farms, and to

purchase buildings and land constituting a minimum adequate site, in order to provide them, their tenants, lessees, sharecroppers, and laborers with decent, safe, and sanitary living conditions and adequate farm buildings as specified in this subchapter, and (2) to owners of other real estate in rural areas for the construction, improvement, alteration, or repair of dwellings, related facilities, and farm buildings and to rural residents for such purposes and for the purchase of buildings and the purchase of land constituting a minimum adequate site, in order to enable them to provide dwellings and related facilities for their own use and buildings adequate for their farming operations, and (3) to elderly or handicapped persons or families who are or will be the owners of land in rural areas for the construction, improvement, alteration, or repair of dwellings and related facilities, the purchase of dwellings and related facilities and the purchase of land constituting a minimum adequate site, in order to provide them with adequate dwellings and related facilities for their own use, and (4) to an owner described in clause (1), (2), or (3) for financing indebtedness which—

(A) was incurred for an eligible purpose described in such clause,

(B) if not refinanced, is likely to result at an early date in loss of the applicant's necessary dwelling or essential farm service buildings, or, if combined with a loan for improvement, rehabilitation, or repairs and not refinanced, is likely to cause a hardship for the applicant, and

(C) was incurred by the applicant at least five years prior to his applying for assistance under this subchapter.

§ 1472. Loans for housing and buildings on adequate farms

Terms of loan

(a) If the Secretary determines that an applicant is eligible for assistance as provided in section 1471 of this title and that the applicant has the ability to repay in full the sum to be loaned, with interest, giving due consideration to the income and earning capacity of the applicant and his family from the farm and other sources, and the maintenance of a reasonable standard of living for the owner and the occupants of said

farm, a loan may be made by the Secretary to said applicant for a period of not to exceed thirty-three years from the making of the loan with interest, in the case of applicants described in clauses (1) and (2) of section 1471(a) of this title, at a rate not to exceed 5 per centum per annum on the unpaid balance of principal, and, in the case of applicants described in clause (3) of section 1471(a) of this title and applicants under sections 1473 and 1474 of this title, at a rate not to exceed 4 per centum per annum on such unpaid balance. Loans made or insured under this subchapter shall be conditioned on the borrower paying such fees and other charges as the Secretary may require and on the borrower prepaying to the Secretary as escrow agent, on terms and conditions prescribed by him, such taxes, insurance, and other expenses as the Secretary may require in accordance with section 1471(e) of this title. The Secretary may accept the personal liability of any person with adequate repayment ability who will cosign the applicant's note to compensate for any deficiency in the applicant's repayment ability.

§ 1476. Buildings and repairs

Construction in accordance with plans and specifications; supervision and inspection; technical services and research

(a) In connection with financial assistance authorized in this subchapter, the Secretary shall require that all new buildings and repairs financed under this subchapter shall be substantially constructed and in accordance with such building plans and specifications as may be required by the Secretary. Buildings and repairs constructed with funds advanced pursuant to this subchapter shall be supervised and inspected as required by the Secretary. In addition to the financial assistance authorized in this subchapter, the Secretary is authorized to furnish, through such agencies as he may determine, to any person, including a person eligible for financial assistance under this subchapter, without charge or at such charges as the Secretary may determine, technical services such as building plans, specifications, construction supervision and inspection, and advice and information regarding farm dwellings and other buildings.

2. Title 7 of the Code of Federal Regulations (1983), promulgated by the Farmers Home Administration under the Housing Act of 1949, provides in pertinent part:

§ 1924.9 Inspection of development work.

The following policies will govern the inspection of all development work.

(a) *Responsibility for inspection.* The County Supervisor or District Director, accompanied by the borrower when practicable, will make final inspection of all development work and periodic inspections as appropriate to protect the security interest of the government. In this respect, inspections other than final inspections, may be conducted by other qualified personnel as authorized under agreements executed by or authorized by the National Office. The borrower will be responsible for making inspections necessary to protect the borrower's interest. FmHA's inspections are not to assure the borrower that the house is built in accordance with the plans and specifications. The inspections create or imply no duty or obligation to the particular borrower but are, rather, for the dual purposes of determining that FmHA has adequate security for its loan and enabling FmHA to determine that FmHA is working toward achieving the statutory goal of providing adequate housing. On jobs involving difficult technical problems, the County Supervisor may request the assistance of the State Office. Qualified technicians from SCS or the State University Cooperative Extension Service may be requested to assist on any such jobs.

(b) *Frequency of inspections.* The County Supervisor or District Director will inspect development work as frequently as necessary to assure that construction and land development conforms with the drawings and specifications. The final inspection will be made at the earliest possible date after completion of the planned development. When several major items of development are involved, final inspection will be made upon completion of each item.

(1) For new buildings and additions to existing buildings, inspections will be made at the following stages of construction and at such other stages of construction as determined by the County Supervisor or District Director except as modified by paragraph (b)(3) of this section.

(i) *Stage 1.* Customarily, the initial inspection in construction cases is made just prior to or during the placement of concrete footings or monolithic footings and floor slabs. At this point, foundation excavations are complete, forms or trenches and steel are ready for concrete placement and the subsurface installation is roughed in. However, when it is not practicable to make the initial inspection prior to or during the placement of concrete, the County Supervisor or District Director will make the initial inspection as soon as possible after the placement of concrete and before any backfill is in place.

(ii) *Stage 2.* The Stage 2 inspection will be made when the building is enclosed, structural members are still exposed, roughing in for heating, plumbing and electrical work is in place and visible, and wall insulation and vapor barriers are installed. Customarily, this is prior to installation of brick veneer or any interior finish which would include lath, wallboard and finish flooring.

(iii) *Stage 3.* The final inspection will be made when all on-site and off-site development of the structure has been completed and the structure is ready for occupancy or its intended use.

(2) For rehabilitation of existing buildings, inspections will be made in accordance with paragraphs (b)(1)(ii) and (iii) of this section, and at such other stages of construction to assure that construction is being performed in a professional manner and in accordance with the FmHA approved drawings and specifications.

(3) For cases when the County Supervisor determines that the property will be covered by an insured 10 year warranty plan, only the final inspection is required. However, for this inspection exception to apply:

(i) If the dwelling is to be build by contract for an FmHA borrower, or an FmHA conditional commitment has been issued, a copy of the warranty plan must be submitted to the County Supervisor before construction begins.

(ii) If the dwelling was built without a contract for an FmHA borrower or an FmHA conditional commitment, a copy of the dwelling plans and specifications and a copy of the warranty plan must be submitted to the County Supervisor before the property is appraised by FmHA.

(4) Arrangements should be made to have the borrower join the County Supervisor or the District Director in making periodic inspections as often as necessary to provide a mutual understanding with regard to the progress and performance of the work.

(5) The borrower should make enough periodic visits to the site to be familiar with the progress and performance of the work, in order to protect the borrower's interest. If the borrower observes or otherwise becomes aware of any fault or defect in the work or nonconformance with the contract documents, the borrower should give prompt written notice thereof to the contractor with a copy to the County Supervisor or District Director responsible for servicing the type of loan or grant involved.

(6) The borrower should, when practical, join the County Supervisor or District Director in making all final inspections.

(7) When irrigation equipment and materials are to be purchased and installed, a performance test under actual operating conditions by the person or firm making the installation should be required before final acceptance is

made. The test should be conducted in the presence of the borrower, a qualified technician, and, when practicable, the County Supervisor. If the County Supervisor is not present at the performance test, the County Supervisor should request the technician to furnish a report as to whether or not the installation meets the requirements of the plans and specifications.

(8) For irrigation and drainage construction or any dwelling construction where part or all of the work will be buried or backfilled, interim inspections should be made at such stages of construction that compliance with plans and specifications can be determined.

(c) *Recording inspections and correction of deficiencies.* All periodic and final inspections made by the County Supervisor or District Director will be recorded on Form FmHA 424-12 in accordance with the FMI for the form. The County Supervisor or District Director will be responsible for following up on the correction of deficiencies reported on Form FmHA 424-12. When an architect/engineer is providing services on a project, the District Director should notify the architect/engineer immediately of any fault or defect observed in the work or of any nonconformance with the contract document. If the borrower or the contractor refuses to correct the deficiencies, the District Director will report the facts to the State Director who will determine the action to be taken. No inspection will be recorded as a final inspection until all deficiencies or nonconforming conditions have been corrected.

(d) *Warranty period.* Form FmHA 424-19 or an acceptable insured 10-year warranty plan on RH loans for new construction will be provided by the contractor or warrantor. When an acceptable insured 10-year warranty has been provided, the County Supervisor will assist the borrower to the extent necessary under the provisions of the warranty and Subpart F of Part 1924 of this chapter. When the contractor provides the warranty on Form FmHA 424-19, the County Supervisor or the District Director will take the following

action prior to the expiration of the first year of the warranty period:

(1) As soon as the warranty has been executed, the follow-up date for sending Form FmHA 424-21, "Notice of Expiration of Builder's Warranty," will be posted to the "Servicing and Supervision" section of the Management System card.

(2) Form FmHA 424-21 is provided for use in notifying the borrower of the expiration date of the Builder's Warranty. This letter will be mailed to the borrower early in the second month preceding the expiration date of the warranty period.

(3) If the County Supervisor or District Director does not hear from the borrower within 30 days, it can reasonably be assumed that no complaint exists or that any complaint has been satisfied, unless information to the contrary has been received.

(4) If the borrower notifies FmHA that any complaint has not been satisfied, an on-site inspection shall be made as early as possible, but not later than one month preceding the expiration date of the warranty period. The results of the inspection visit will be recorded on Form FmHA 424-12. If the borrower's complaints are justified, the case should be handled in accordance with Subpart F of Part 1924 of this chapter.

(e) *Acceptance by responsible public authority.* When local (city, county, State, or other public authority) codes and ordinances require inspections, final acceptance by the local authority having jurisdiction will be required prior to final inspection or acceptance by FmHA.

(f) *Acceptance by project architect.* If architectural services pursuant to § 1924.13(a) have been obtained, final acceptance by the project architect pursuant to § 1924.13(a)(5)(v) will be required prior to acceptance by FmHA.